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THE HAGUE CONFERENCE OF 1904 FOR THE ADVANCEMENT OF PRIVATE INTERNA- TIONAL LAW.

The YALE LAW JOURNAL for June, 1903, contained a description of the work of the three conferences held at the Hague in 1893, 1894 and 1900, for the advancement of private international law in Europe. Fifteen nations took part in them by their official delegates, comprehending all the leading Continental powers. Great Britain declined an invitation to participate, on the ground of the dissimilarity between her system of law and those of the rest of Europe.

The result was an agreement by most of the powers represented to certain conventions for the regulation of judicial procedure and the prevention of conflicts of laws touching questions of marriage, divorce and guardianship. This agreement was made by authority only of the executive departments of the nations concerned. The greater part of them, however, exist under written constitutions, by force of which or by the settled usage of the government, it is requisite to secure a ratification by the legislative department of any treaty or convention affecting the personal or property rights of private citizens.

Until the present year only the convention as to civil procedure had received the necessary ratifications. That went into effect in 1899. Since then, ratifications of the other three, which were formally signed in behalf of twelve nations in June, 1902, have been obtained from seven of the powers. These ratifications were exchanged at the Hague on or before June

1, 1904.* Those of the others are confidently expected at an early date.

As between the seven powers (Germany, France, Sweden, Holland, Belgium, Roumania and Luxembourg) the conventions became of force by their terms (Art. 10 making this dependent only on the action of a majority) on August 1, 1904.

In May, 1904, pending these ratifications, a fourth conference met at the Hague, called by Holland pursuant to the recommendation of that of 1900. This took up again for consideration the other conventions approved by the conference of 1894 as to bankruptcies and successions; and the further *avant-projets* submitted to the latter on bankruptcies, and on the effects of marriage and divorce on the rights of the parties. The subject of lunacy and its effects was also considered, and the sessions of the conference lasted through the greater part of June. The convention on matters of civil procedure which was already in force was also revised and certain amendments adopted, which the five years' practice under it seemed to render desirable.

The final outcome of the conference of 1904 was, beside this revision, the proposition of four new conventions: on succession, bankruptcies, the relations between husband and wife established by their marriage, and lunatics.

The convention as to civil procedure, if amended as proposed, will effectually settle the mode of service of process to subject non-resident defendants to the jurisdiction of the courts; the manner of bringing suits by foreigners; the execution of foreign judgments; and the methods to be pursued under rogatory commissions to take evidence. Among other things, it will sanction the service of citations on subjects of the power under whose authority they may be issued, made in another country through the diplomatic or consular representatives of the former.

Several of the proposed amendments were adopted with a view of preventing occasion for any injustice from the service of process from the courts of one country within its territory on subjects of another who may be transiently found there, when this service is in aid of pending proceedings in the courts of their own nation, as in the case of an inquest to take evidence as to a state of facts. One of those who participated in the

* Clunet, *Journal de Droit International Privé*, for 1904, No. V-VI, p. 746.

conference of 1904, and is well qualified to judge, has summarized the general result in these respects as adapted in its present shape to elevate the administration of international justice by its very wide extension of the duty of one power to extend legal help to those claiming rights under foreign laws.*

The conventions on successions, marital relations and lunatics, are all bottomed on the application of the law of a party's nationality.

England and the United States have always stood for the law of domicil or that of the seat of a transaction, as the proper rule for regulating the rights of a person or the effects of a legal act. The person whose relations may be in question may thus freely select the applicable law; for he may change his domicil at pleasure, and enter into contracts or do a non-contractual act, wherever he thinks proper.

Italy has been equally persistent in maintaining the right of his own state to dictate the applicable law. Her jurists have rejected the principle of freedom of personal choice for that of national subjection. A man may, indeed, under the present rule of international law, change his nationality, without the express consent of his sovereign; but they declare that so long as it is unchanged he is subject to its laws, and when changed he is subject to the laws of his new nationality, whatever may be the place of his domicil.

While Germany was a loose confederation, she adhered to the Anglo-American view, and for similar reasons. Her present imperial constitution and her imperial code of 1900, with its centralizing provisions,† have now made it her policy to prefer nationality.

The other continental nations represented in the conferences agreed on the same view, and it has thus now become (though with certain exceptions) the general law of Europe.

The convention on successions has also departed widely on another point from the principles of Anglo-American law.

It disregards the distinction between real and personal estate, or moveables and immoveables; and upon the death of the owner of property sends it all, whatever be its character, to

* Meili, *Das Internationale Civilprocessrecht auf Grund der Theorie, Gesetzgebung und Praxis*, (Zurich, 1904) 434, 435.

† See Sec. 3 of the law of introduction to the Civil Code.

those (subject to certain minor exceptions) to whom the law of his nationality would give it.

Professor Jitta of the University of Amsterdam, in discussing the results of these four conferences before the Universal Congress of Jurists and Lawyers, which met in St. Louis in September, 1904, expressed the opinion that they were but the beginning of a great work—namely, the formation of an international union in Continental Europe for the codification of private international law. But whether England or the United States could be expected to become parties to such an organization, he justly considered as a matter of grave doubt.

For the American powers, other than the United States, the road would be easy. Their jurisprudence rests on a different foundation, and one quite similar in its nature to that underlying the laws of most of the powers who were parties to the Hague conferences.

The four conventions, emanating from these conferences, which are already in force, have but an indirect or slight effect on property relations. Those now coming from the same source have a direct and great effect in that direction. If the work of the conference of 1904 be ratified by the legislative departments of the powers represented, it will determine for their people the rights of husband and wife in each other's property, the devolution of the estates of the dead and the settlement of those of bankrupts.

The regulating principle of nationality is one easy to apply. If a Frenchman dies leaving property, whether real or personal, in Roumania or Sweden, it will be distributed precisely as if it were situated in France and subject to the control of French law as administered by French courts. No will can be treated as operative in one country or as to one kind of property, and inoperative in another country or as to another kind of property. Heirship to land will be controlled by the law of the ancestor's nation; not by that of the country in which the land may lie. Title to a bankrupt's land will pass to his assignee in bankruptcy once for all, by a conveyance which will be sufficient, if it be such by the laws of his own nation.

These are the general principles which will control, though they are made subject to certain exceptions, and in carrying them out ancillary local assurances or decrees will in practice often be required.

This merger of land in the general mass of a man's property,

however foreign to Anglo-American law, is in accord not only with the general theory of Roman law, but with the prevailing tendencies of our own time, throughout the world.

When rights in land put their possessor in a higher position in respect to his political relations or vitally affected his civil *status*, there was a reason for making the mode of its devolution depend in all particulars on the will of the sovereign within whose territory it lay. So long as it was the chief part of every large estate, there was a further reason for requiring special safeguards in case of transfer or succession. But the landed aristocracies are fast following feudalism into decay and oblivion. The great fortunes of the modern world are mainly invested in corporate securities. Corporations are also, as respects business property, the largest land owners. They are at the same time becoming citizens of the world. Their ships traverse all waters. Their commercial paper constitutes the bulk of the exchanges by which international trade is carried on. Their securities are held in countries remote from each other. If they become bankrupt, the interests of citizens of ten or twenty different nations are often affected. Their real estate they virtually, so far as its ownership is concerned, turn into personal estate, for it is represented by the shares of stock.

It would be difficult for England and the United States to acknowledge the force of these conditions of modern society so far as to induce them to surrender their long-cherished and far-reaching distinctions between real and personal estate. It cannot, however, be pronounced impossible; and stranger things have happened in the development of political institutions, than would be the ultimate accession of these powers to the principles of these Hague conventions. It is hard for two nations, however great, to stand up against the world for traditional distinctions that have struck no new roots into the earth of to-day.

So far as the principle of nationality is concerned, as opposed to the rule of domicil, its incorporation into Anglo-American law would require the surrender of much less.

In its application to the United States it would be necessary, as our law now stands, to treat each State as a nation to which its citizens belong, within the meaning of any such conventions.

Possibly the United States, under their treaty powers, could go farther than they have ever yet gone, and impose upon all their people a general nationality with certain consequences as to successions, bankruptcy and the marital relations. It would be, except quantitatively, no greater interference with State

rights than treaties giving aliens a right to succeed to real estate in any State, despite its laws to the contrary; and such treaties have been in force for a century and received the sanction of the Supreme Court of the United States. But the same result could be measurably attained in the manner first suggested.

This would be in line with the construction given to our extradition treaties. These provide for demands upon a foreign country by the executive department of the United States for the surrender of those who have committed criminal violations of the laws of this country. Such a treaty would be of little avail if it did not cover violations of State laws, for ninety-nine out of a hundred crimes are acts of that character, and are not cognizable by the federal courts. The American courts, therefore, at least, construe "country" as including the several States, respectively, as well as the United States as a whole.*

In many of the treaties of the United States with foreign powers similar language is used in other connections, which must be given the same meaning and effect in order to secure the accomplishment of its plain purpose. Thus, Article VI of our treaty of 1850 with the Swiss Confederation provides that any controversy between claimants to the same succession, as to whom the property shall belong, "shall be decided according to the laws and by the judges of the country in which the property is situated." It would be absurd to hold that this referred simply to our federal laws and federal courts. The provision obviously contemplates a reservation of jurisdiction to the State courts, as to all matters to which State laws apply; and a similar right would belong to the judiciary of the several Swiss cantons, as to property situated in any of them, title to which was not regulated by the general laws of the Confederation.

It is also to be considered that the present restrictions on naturalization in, as well as on emigration to, the United States, decrease the number of cases in which it might be inconvenient to regulate rights claimed under or against a foreigner by his own national law, rather than that of his domicil. The present immigrants are of a superior class as compared with those of the preceding generation. It is less difficult to determine their nationality, and our means of knowledge of foreign laws are much improved.

* *Wright v. Henkel*, 190 U. S., 40, 58-61.

As in the case of the four conventions already in force, the four new ones of 1904 have to do mainly with matters of detail. Their tone is practical and unambitious. They do not deal in glittering generalizations nor lay down a series of legal axioms of universal application. The fundamental principles asserted are few. They may not unfairly be reduced to these: that a man, for certain purposes, remains subject to the law of his nation when he goes to live elsewhere; that a man's estate, for purposes of succession, is to be regarded as a unit, and not split up into two parts because some of his property is in land; and that conflicts of laws upon any subject are to be avoided, not by agreeing on one universal law on that subject, but by agreeing as to which of several conflicting laws, under which claims might be set up, shall apply to the case, and be given a controlling effect.

Of the fifteen states which ratified the convention as to civil procedure which went into effect in the spring of 1899, none have found reason to be dissatisfied with its main provisions. It has therefore not been denounced by any of them, and by virtue of its terms now runs until the spring of 1909.*

The three conventions which became operative in August, 1904, run until August, 1909.

If the course pursued with regard to the work of the conference of 1904 corresponds to the treatment of these prior conventions, a year or two will be consumed in reaching their full ratification by the executive departments of the signatory powers; and a year or two more will naturally be required before they can well receive proper consideration by their legislative departments. If they come into force in 1907, it will be as soon as is probably either practicable or desirable. So important a change in European practice ought to become measurably familiar to the public before it goes into actual effect, and delays which serve this purpose have much to recommend them. What is slowly matured and gradually adopted is apt to last the longest.

Should their ratifications be thus secured, the leading continental states of Europe will thus, by 1907, have eight different international agreements in force between them, on as many subjects of the first importance. For these powers, private international law will be half codified, so far as it concerns

* Meili, *op. cit.*, 193.

marital relations, guardianship, insane persons, bankruptcies, and succession, testate or intestate. This will put the constitution of the family on a more settled footing, and avoid occasion for disputes over matters as to which controversy is peculiarly unfortunate. It will also be a great aid to international trade, in securing to creditors simpler remedies for the collection of their demands.

Another important result in respect to international law in general cannot fail to be the addition of new strength to the rule of reciprocity. These Hague conventions are purely reciprocal. They confer no rights on citizens of nations which are not parties to them. Practice under them may lead courts to the adoption of rules of wider application; but if so, it will be a departure from the system set up by the conventions themselves.

Take, for instance, the matter of enforcing foreign judgments. Is there any obligation imposed by them on the defendant, to which he should be regarded as subject, wherever he may be found, or do courts recognize them, if at all, simply as an affair of mutual accommodation between particular nations? There is a strong current in favor of restricting recognition to judgments of a country whose courts extend similar recognition to those of a like character rendered elsewhere. The Hague conferences have acted on this basis. The signatory powers have formed a mutual legal-aid union and make no provision for those who are outside of it.

Nations, unlike individuals, have a right to be selfish. They give themselves preferences in internal affairs. If they have a claim for taxes or anything else against one of their citizens who is insolvent, they properly insist on being paid first, and paid in full. So may they fairly agree with each other on an exchange of mutual benefits, in which no outsider can claim to share. It is not an unnatural arrangement, and when entered into by the great nations of a great continent, must have a profound influence on the practice of the world.

The judicial department of a government follows the lead of the political department in matters pertaining to international relations. A rule of legislative reciprocity founded on a selection from identity of geographical location is not unlikely to result in rules of judicial reciprocity founded on a selection from similarity of laws and institutions.

Simeon E. Baldwin.